UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UGORJI O. UGORJI, Plaintiff, v. NEW JERSEY ENVIRONMENTAL INFRASTRUCTURE TRUST, et al., Defendants.	HONORABLE JOSEPH E. IRENAS CIVIL ACTION NO. 08-5424 (JEI/JS) **OPINION**

APPEARANCES:

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IRENAS, Senior District Judge:

Plaintiff is a United States citizen of Nigerian descent who initiated this action against his employer, the New Jersey

Environmental Infrastructure Trust ("NJEIT"), and several of its officers, including Robert Briant, Sr., Chairman of the NJEIT Board of Trustees; Dennis Hart, NJEIT Executive Director; Frank Scangarella, NJEIT's Chief Operating Officer (collectively the "Individual Defendants"). Plaintiff seeks to recover for alleged violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Fourteenth Amendment's Equal Protection Clause.[1] Pending before the Court are Motions for Summary Judgment filed by Defendant NJEIT and by the Individual Defendants Briant, Hart, and Scangarella.[2]

I.

Plaintiff first became an employee of NJEIT in 1996 as an Administrative Assistant 2 ("AA2") with an annual salary of $43,458.99.[3] (Ind. Defs' 56.1 Stat. ¶¶ 16-17, 26.)[4] To date, Plaintiff remains employed as an AA2 at NJEIT with an annual

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[1] The Court exercises subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

[2] On March 8, 2012, Defendants jointly moved to strike Plaintiff's late-filed exhibits due to his repeated failure to comply with Court-ordered filing deadlines. The Court will deny this Motion to Strike and consider the late-filed exhibits.

[3] Plaintiff "bumped" into his position at NJEIT when his prior positions at the Department of Environmental Protection ("DEP") and the Green Acres Program were targeted for layoffs. (Ind. Defs' 56.1 Stat. ¶ 16.)

[4] References to "Ind. Defs' 56.1 Stat." are to Defendants Briant, Hart, and Scangarella's statement of undisputed material facts submitted in support of their Motion.

salary of $77,863.84. (*Id.* at ¶¶ 17, 19, 26.) An AA2 "[a]ssists a division director in a state department, institution, or agency by performing and coordinating administrative support services; does related work as required." (*Id.* ¶ 28). This position includes duties such as filing and scanning documents and invoices, maintaining inventory, filing bank statements, conducting seminar surveys, and performing vehicle maintenance. (*Id.* ¶¶ 30-31.) Plaintiff possesses a doctorate degree in education administration and believes that his "skills and experience were not being fully utilized" by the AA2 position, which does not require a doctorate degree. (*Id.* ¶¶ 32-33; Yi Cert. Ex. B at 85-86.)

On March 2, 2001, Plaintiff filed a Complaint with the New Jersey Division of Civil Rights alleging employment discrimination based on national origin against NJEIT. (*Id.* ¶ 34.) On November 16, 2006, Plaintiff executed a Settlement Agreement and Release, wherein Plaintiff agreed to withdraw his Complaint and

> permanently waive and release any and all present and future claims that were brought, or could have been brought, by [Plaintiff] against the State of New Jersey or any of its departments, or components of such departments including specifically, but not exclusively, the [DEP], [NJEIT] and/or any of its employees, divisions and/or agents in connection with the above-captioned Verified Complaint, including, but not limited to, attorney's fees and costs, claims for monetary damages, back pay, compensatory time,

> grievances, unfair labor practices and/or discrimination or retaliation claims, in any forum.

(*Id.* ¶ 37; Yi Cert. Ex. 8.) The Release included "all claims under Title VII of the Civil Rights Act" and "all claims involving any continuing effects of actions or practices which arose prior to the date of [the] General Release and bars the use in any way of any past action or practice in any subsequent claim." (*Id.* ¶ 38.)

Following this 2006 settlement, Plaintiff alleges that he continued to experience discrimination with respect to the assignment of job duties and job titles. Plaintiff claims he should have been assigned various human resource duties that were assigned to Trudy Edinger, and newsletter and annual report production duties that were assigned to John Laurita. (*Id.* ¶¶ 45, 48.) In addition, Plaintiff believed that he should have been given EEO/Affirmative Action and Trust Ethics Officer duties, which were assigned to NJEIT Chief Operating Officer, Defendant Scangarella. (*Id.* ¶¶ 43-44, 48.)

In May 2007, Plaintiff sought and received additional duties from his supervisor, Defendant Scangarella.[5] (*Id.* ¶ 38.) In July and August 2007, Plaintiff discussed the possibility of reclassification and promotion, and Defendant Scangarella stated

[5] These duties related to an emergency loan program, a financing program for septic tank replacement and a document retention plan. (Ind. Defs' 56.1 Stat. ¶ 59.)

that he would support a reclassification if his daily job responsibilities merited it. (*Id.* ¶¶ 61-62.) Defendant Scangarella also informed Plaintiff that as an alternative to seeking a desk audit Plaintiff could provide him with additional information to support a reclassification request. (*Id.* ¶¶ 67-68.) Plaintiff declined this alternative. (*Id.* ¶ 68.)

In January 2008, following a desk audit, the Department of Personnel ("DOP") issued a draft determination that Plaintiff's civil service title should be reclassified from AA2 to Administrative Analyst 1.[6] (*Id.* ¶¶ 69.) By letter dated February 13, 2008, NJEIT disagreed with the DOP determination and explained that Plaintiff "currently does not perform [the] functions [of an Administrative Analyst 1], they are not envisioned by [NJEIT] as to [sic] consistent with his current responsibilities, nor needed by [NJEIT] in its operations (or currently performed by others at [NJEIT])." (*Id.* ¶ 71; Yi Cert. Ex. 12.)

Nevertheless, in a letter dated March 20, 2008, DOP reclassified Plaintiff's civil service title from AA2 to

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[6] The Administrative Analyst 1 position is defined as follows: "Under supervision of a supervisory official in a state department, institution, or agency, performs duties of significant difficulty and/or supervises staff involved with review, analysis, and appraisal of current department administrative procedures, organization, and performance, and prepares recommendations for changes and/or revision therein; does related duties as required." (Yi Cert. Ex. 11.)

Administrative Analyst 1. (*Id.* ¶ 73.) NJEIT continued to disagree with this determination, and edited Plaintiff's Performance Evaluation System ("PES") Agreement to provide greater detail regarding Plaintiff's responsibilities and work standards. (*Id.* ¶ 74.) After reviewing the revised PES Agreement, the DOP was satisfied that Plaintiff's assigned duties reflected his title as AA2 and reclassified him accordingly.[7] (*Id.* ¶ 77.)

In 2010, NJEIT offered Plaintiff the opportunity to draft its newsletters and its annual report; however, Plaintiff declined these opportunities. (*Id.* ¶¶ 79-81.) A second desk audit was ordered due to Plaintiff's insistence that his PES Agreement included duties covered by the Administrative Analyst 1 position. (*Id.* ¶ 82.) The second desk audit concluded that Plaintiff was appropriately classified as an AA2. (*Id.* ¶ 83.) Plaintiff appealed this determination, and it was upheld by the Civil Service Commission in July, 2011. (*Id.* ¶ 84.)

NJEIT and the Individual Defendants filed their Motions for Summary Judgment on December 9, 2011.

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[7] In a letter dated September 17, 2008, DOP noted that: NJEIT "chose to remove the duties associated with Administrative Analyst 1 and assign duties more appropriate to Administrative Assistant 2, in accordance with N.J.A.C. 4A:3-3.5c(1)." (Yi Cert. Ex. 15.)

II.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)).

In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). "'With respect to an issue on which the non-moving party bears the burden of proof, the burden on the moving party may be discharged by 'showing'– that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case.'" *Conoshenti v. Public Serv. Elec. & Gas*, 364 F.3d 135, 145-46 (3d Cir. 2004) (quoting *Celotex*, 477 U.S. at 323). The role of the Court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

"Summary judgment, of course, looks only to admissible evidence." *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir. 1987); *see also Blackburn v. United Parcel*

Service, 179 F.3d 81, 95 (3d Cir. 1999)(noting that hearsay statements that are inadmissible at trial should not be considered when determining whether Plaintiff has established a triable issue of fact).

III.

A.

Count One of Plaintiff's Third Amended Complaint asserts a discrimination claim against NJEIT pursuant to Title VII. According to the Third Amended Complaint,

> NJEIT refused to address or investigate issues included in Dr. Urgorgi's many internal complaints and union grievances concerning allegations of disparate treatment and abusive conduct in the workplace by Mr. Scangarella. NJEIT's conduct was the cause of decisions denying Mr. Ugorgi a reclassification of his position, denying him an ergonomically sufficient workstation, an adjustment of his salary and other adverse employment actions.

(Third Amended Compl. ¶ 64.)

In support of its Motion for Summary Judgment, NJEIT argues that (1) it is not an employer within the meaning of Title VII and that (2) Plaintiff cannot establish an adverse employment action.

An employer within the meaning of Title VII is one who is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." 42 U.S.C. § 2000e(b). Plaintiff does not dispute that NJEIT has

only thirteen employees, (*see* Third Amended Compl. ¶ 16), but rather, argues that NJEIT and DEP should be considered an "integrated enterprise" in order to satisfy the statute's definition of employer. (Pl's Opp. at 11, ¶ 26.)

In *Nesbit v. Gears Unlimited, Inc.*, the Third Circuit set out the framework for determining whether two nominally distinct entities should be considered one for Title VII purposes. 347 F.3d 72, 85 (2003). A company and its affiliates should be considered a single employer under Title VII (1) "when a company has split itself into entities with less than fifteen employees intending to evade Title VII's reach; or (2) when a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining;" or (3) "when the entities' affairs are so interconnected that they collectively caused the alleged discriminatory employment practice." *Id.* at 85-86.

Here, there is no evidence to support situation (1) or (2), and Plaintiff's primary argument is that the DEP provides NJEIT with personnel, payroll and financial services as well as labor relations. (Pl's Opp. at 11.) With respect to situation (3), so-called "substantive consolidation", the Third Circuit explained that the inquiry should focus on "whether operations of the companies are so united that nominal employees of one company are treated interchangeably with those of another." 347 F.3d at 87. Relevant factors include:

> (1) the degree of unity between the entities with respect to ownership, management (both directors and officers), and business functions (e.g., hiring and personnel matters), (2) whether they present themselves as a single company such that third parties dealt with them as one unit, (3) whether a parent company covers the salaries, expenses, or losses of its subsidiary, and (4) whether one entity does business exclusively with the other.

Id.

In support of his position, Plaintiff cites to the deposition testimony of Defendant Hart and David Zimmer, current NJEIT Director, as evidence of the integrated nature of the two agencies. This testimony demonstrates that NJEIT seeks assistance from DEP regarding policy questions on hiring, promotions and paperwork, (Hart Dep. at 23:17-21, Pl's Ex. 7), and that NJEIT salaries are paid from the Department of Treasury through DEP. (Zimmer Dep. at 41:8-11, Pl's Ex. 13.)

The Court finds this evidence insufficient to create a genuine issue of material fact as to whether NJEIT and the DEP are "substantively consolidated." Not only does this evidence fall far short of demonstrating that the two entities "are so united that nominal employees of one company are treated interchangeably with those of another," but it also ignores the fact that NJEIT was established pursuant to a statute, *see* N.J.S.A. 58:11B-1 et seq, providing that "[t]here is established in, *but not of*, the Department of Environmental protection a body

corporate and politic, with corporate succession, to be known as the [NJEIT]." N.J.S.A. 58:11B-4 (emphasis added). Thus, the Court finds that because NJEIT has only thirteen employees and substantive consolidation with DEP is not warranted, NJEIT is not an employer within the meaning of Title VII.

Assuming arguendo that NJEIT is an employer within the meaning of Title VII, NJEIT is nevertheless entitled to summary judgment because Plaintiff has failed to present evidence that he suffered an adverse employment action. An adverse employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Durham life Ins. Co. v. Evans*, 166 F.3d 139, 152-53 (3d Cir. 1999)(quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). An adverse employment action may also be found where an employee's earning potential has been substantially decreased and a significant disruption to his working conditions results. *Id.* at 153.

Plaintiff has not alleged that he has been fired, suspended, demoted, or suffered a loss of pay. Instead, Plaintiff argues that NJEIT's opposition to his requested reclassification as an

Administrative Analyst 1 is an adverse employment action.[8] The Court does not agree. Pursuant to state regulation, NJEIT is obligated to ensure that the job titles of its employees match their job duties. *See* N.J.A.C. 4A:3-3.4 ("No person shall be . . . employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds"). The procedures which NJEIT followed in opposing Plaintiff's attempted reclassification of his position are set forth in N.J.A.C. 4A:3-3.9. It was NJEIT's legal right to oppose Plaintiff's reclassification pursuant to the procedures set forth in the New Jersey Administrative Code. Indeed, it was its responsibility to ensure proper classification of its employees.

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[8] Plaintiff also identifies a series of workplace slights and petty grievances, including, being ordered to remove a bag he brought to work for eight years, being followed and yelled at, being watched in his office and at the copying machines, and being denied an ergonomically sufficient workstation. These allegations, taken individually or collectively, do not constitute an adverse employment action. *See, e.g., Clayton v. Pennsylvania Dept. of Welfare*, 304 Fed. Appx. 104, 106-07 (3d Cir. 2008)(plaintiff's complaints of reduced on-call time, threat of furlough, change of work schedule, moved mailbox, denied bonus, removal of furniture from office, and failure to timely respond to grievances did not amount to adverse employment action); *Nagel v. RMA*, 513 F.Supp. 2d 383, 391 (E.D.Pa. 2007)(heated meeting with supervisor who made performance criticisms followed by tense and uncomfortable working environment is not adverse employment action); *Mihalko v. Potter*, 2003 WL 23319594, at *2,6 (W.D.Pa. Dec. 12, 2003)(denying leave, issuing warnings, monitoring plaintiff at work, forcing plaintiff to work in unheated room, ordering other employees not to speak to plaintiff do not amount to adverse employment actions).

The proper exercise of a legal right to discharge a legal obligation plainly cannot form the basis of an adverse employment action. *See Flint v. City of Phila.*, 1998 WL 480849, at *5 (E.D.Pa. August 12, 1998)(holding that taking an appeal from an arbitration award is a legal right which is not an adverse employment action for the purposes of Title VII).

Accordingly, summary judgment will be granted to NJEIT on Plaintiff's Title VII claim.

B.

Count Two of Plaintiff's Third Amended Complaint asserts a claim against the Individual Defendants pursuant to 42 U.S.C. § 1983 for an alleged denial of equal protection under the Fourteenth Amendment of the United States Constitution.[9] Plaintiff alleges that the Individual Defendants violated his constitutional rights by failing to promote him or recommend that his civil service title be reclassified, and by intentionally

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[9] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983.

denying him other unspecified employment opportunities. (Third Amended Compl. ¶ 70.)

In support of their Motion for Summary Judgment, the Individual Defendants argue that (1) Plaintiff cannot establish that he was treated differently than similarly situated employees; (2) Plaintiff has offered no evidence of purposeful discrimination; and (3) the Individual Defendants have proffered numerous non-discriminatory reasons for opposing Plaintiff's reclassification to Administrative Analyst 1.

To state a claim for denial of equal protection under the Fourteenth Amendment, a plaintiff must prove that he is a member of a protected class and that he was treated differently than similarly situated members of an unprotected class. *See Andrews v. City of Phila.*, 895 F.2d 1469, 1478 (3d Cir. 1990). Here, the basis of Plaintiff's equal protection claim is the Individual Defendants' opposition to his requested reclassification from the clerical position of AA2 to the management position of Administrative Analyst 1[10] Plaintiff makes two arguments in support of his equal protection claim. First, Plaintiff argues that he was more qualified to assume the additional duties that were assigned to white NJEIT employees, which ultimately led to their promotion or reclassification. Second, Plaintiff argues

[10] It appears from the record that only Defendant Scangarella participated in opposing Plaintiff's reclassification.

that NJEIT required him to seek a desk audit for a reclassification whereas white employees obtained promotions or reclassifications without having to go through the desk audit process.

Plaintiff has failed to come forth with sufficient evidence to sustain an equal protection claim on either of these theories. As to the assignment of additional duties, Plaintiff has not presented any evidence that he was similarly situated to the white employees that were assigned the duties. The record does not include any of their personnel files, resumes, or other evidence to support an inference that Plaintiff was equally qualified to assume the additional duties. Moreover, the employees identified by Plaintiff had vastly different job titles. Defendant Scangarello was NJEIT's Chief Operating Officer. John Laurita had a managerial title and was reclassified to a higher managerial title, whereas Plaintiff had a clerical title and was seeking reclassification to a managerial title. Indeed, Plaintiff could not identify any NJEIT employee with a clerical-title who was promoted to a management title. (*See* Pl's Opp. to Ind. Defs' 56.1 Stat. ¶ 27.)

Second, Plaintiff's own admissions belie his argument that he was required to seek a desk audit for reclassification while white employees were not. Not only has Plaintiff admitted that Defendant Scangarella offered him an alternative to a desk audit,

which Plaintiff admittedly declined, but Plaintiff also acknowledges that Mary Claire D'Andrea, a white employee, sought a desk audit for reclassification.[11] (*See* Yi Cert. Ex. B, 75:7-76:5.)

Accordingly, the Individual Defendants' Motion for Summary Judgment will be granted.

IV.

For the reasons stated above, the Motions for Summary Judgment filed by NJEIT and the Individual Defendants will be granted. An appropriate Order accompanies this Opinion.

Dated: May 29, 2012

s/Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

[11] To the extent that Plaintiff contends that Defendant Scangarella's opposition to the outcome of his desk audit is the basis for his equal protection claim, this argument also fails for lack of evidentiary support. First, Defendant Hart testified that he did not recommend that Mary Claire D'Andrea receive reclassification. (*See* Yi Cert. Ex. E, 29:5-9.) Second, the opposition to a desk audit is a legal right afforded to NJEIT pursuant to the New Jersey Administrative Code, *see supra* III.A., and there is no evidence in the record to support an inference that it was exercised for the purpose of discrimination against Plaintiff.